SWAN PROPERTY SDN BHD & ORS v. MAYBANK TRUSTEES BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ZABIDIN MOHD DIAH JCA
AZIZAH NAWAWI JCA
HASHIM HAMZAH JCA
[CIVIL APPEAL NOS: W-02(IM)(NCC)-24-01-2019
& W-02(IM)(NCC)-26-01-2019]
19 DECEMBER 2022

Abstract – *Section 106 of the Strata Management Act 2013 merely excludes the court's jurisdiction if there is an earlier and pending claim filed within the Strata Management Tribunal's ('SMT') jurisdiction with the same claim filed in court. If the earlier proceedings before the SMT is withdrawn, abandoned or struck out, the court still has the jurisdiction to hear the claim. Likewise, if the claim before the court is withdrawn, abandoned or struck out, the SMT still has the jurisdiction to hear the claim. This is to avoid duplicity of proceedings and inconsistent decisions between the two forums.*

CIVIL PROCEDURE: *Striking out – Writ and statement of claim – Appeal against – Non-payment of renovation cost – Proprietors commenced suit against management corporation and trustee for parcels – Management commenced claims before Strata Management Tribunal ('SMT') against proprietors for outstanding contributions and renovation charges – Application to strike out proprietors' writ and statement of claim – Whether earlier proceedings before SMT withdrawn, abandoned or struck out – Whether court seized with jurisdiction to hear claim – Whether obviously unsustainable case – Whether ought to be struck out – Rules of Court 2012, O. 18 r. 19(1) – Strata Management Act 2013, s. 106*

A resolution to carry out renovations at the Retail Podium of The Summit Subang USJ ('The Summit') was passed during the management corporation's ('MC') first annual general meeting ('AGM'). The renovation was subsequently carried out and completed. During the second AGM, a resolution was passed that: (i) the tender price of the renovation exercise amounted to RM70,480,868; (ii) the cost would be borne by the respective unit proprietors of the Retail Podium, at the rate of RM178.16 per share unit; and (iii) 10% per annum penalty for late payment. More than 90% of the proprietors paid the renovation cost, except for the appellants ('plaintiffs'). The plaintiffs instituted an action against the The Summit's Management Corporation ('first defendant') and the respondent, Maybank Trustees Bhd ('second defendant') at the Shah Alam High Court but the suit was withdrawn ('SAHC Suit'). The plaintiffs later filed another suit at the Kuala Lumpur

High Court ('Suit 82'); the contents, matters, issues and plaintiffs' statement of claim ('SOC') in Suit 82 were the same as that of the SAHC Suit. The first defendant commenced claims before the Strata Management Tribunal ('SMT') against the plaintiffs (except the first, second and fifth plaintiffs), claiming for outstanding contributions under the Strata Management Act 2013 ('Act') and the renovation charges. The first defendant applied to strike out the plaintiffs' (except the fifth plaintiff) writ and SOC ('encl. 10'); the application was allowed. The second defendant too applied to strike out the plaintiffs' writ and SOC ('encl. 15'). The High Court Judge ('HCJ') ordered a stay of the plaintiffs' proceedings against the second defendant in Suit 82, pending the determination of the first defendant's claim against the plaintiffs before the SMT. Hence, the present appeals by the second plaintiff against the decision of the HCJ in encl. 10 ('Appeal No. 26') and encl. 15 ('Appeal No. 24').

Held (dismissing appeals)

Per Hashim Hamzah JCA delivering the judgment of the court:

(1) It was either the court or the SMT that would hear the claim; not both concurrently. The apparent advantage of pursuing a claim before the SMT was that it is cheaper and faster. Be that as it may, any aggrieved party may still challenge the SMT's award on the ground of serious irregularity under s. 121 of the Act or apply to review the decision of the SMT under O. 53 of the Rules of Court 2012 ('ROC'), an order of *certiorari* to quash the SMT's findings. (para 33)

(2) The same issue was raised in the first defendant's claim before the SMT and the plaintiffs' claim against the defendants in Suit 82 before the High Court. Since the first defendant's claim was filed earlier than the filing of Suit 82 and the claim had not been withdrawn, abandoned or struck out, s. 106(1) of the Act applied. Section 106(1) of the Act made it clear that the issue in dispute shall not be the subject of proceedings between the same parties in any court unless the proceedings before the court was commenced before the claim was filed with the Tribunal or the claim before the Tribunal is withdrawn, abandoned or struck out. In the circumstances of this case and in view of SMT's proceedings, the plaintiffs' claim against the first defendant was frivolous, vexatious and was otherwise an abuse of the court's process. This was an obviously unsustainable case which ought to be struck out under O. 18 r. 19(1) of the ROC. There was no merit in the plaintiffs' appeal in Appeal No. 26. (paras 38 & 39)

(3) The court agreed with the HCJ and found no reason to disturb the HCJ findings (as found in para. [41] of this judgment). There were no merits in the plaintiffs' appeal in Appeal No. 24. (paras 42 & 43)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***

JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners) [2019] 5 CLJ 569 FC ***(refd)***

Outlet Rank (M) Sdn Bhd v. Malayan Banking Bhd & Anor [2013] 1 LNS 554 HC ***(refd)***

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:

Central Bank of Malaysia Act 2009, s. 57

Courts of Judicature Act 1964, ss. 23, 24, 25

Housing Development (Control and Licensing) Act 1966, s. 16

Land Acquisition Act 1960, s. 40D

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d), O. 53

Strata Management Act 2013, ss. 105(1), (3), 106(1), 121, Fourth Schedule para. 3 Part 1

(Civil Appeal No: W-02(IM)(NCC)24-01-2019)

For the appellants - Yeoh Cho Kheong & Elizabeth Lau Yen Jin; M/s Ranjit Singh & Yeoh

For the respondents - Yap Yeow Han & Saw Li Lian; M/s Rahmat Lim & Partners

(Civil Appeal No: (W-02(IM)(NCC)-26-01-2019)

For the appellants - Yeoh Cho Kheong & Elizabeth Lau Yen Jin; M/s Ranjit Singh & Yeoh

For the respondents - Harpal Singh Grewal, Harwinder Kaur, Nahvinah Selvaraj, Sarita Menon Mohan & Kausalya Ponnusamy; M/s AJ Ariffin Yeo & Harpal

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-22NCC-82-02-2018 (affirmed)]

Reported by Najib Tamby

JUDGMENT

Hashim Hamzah JCA:

Introduction

[1] For ease of reference, parties shall be referred to as they were before the High Court below.

[2] There were four appeals before us which arose from the same civil suit, Civil Suit No: WA-22NCC-82-02-2018 ("Suit 82"). We have delivered our decisions on all four appeals.

[3] This ground concerns only two of the four appeals, both of which were appealed by the second plaintiff. The two appeals are Civil Appeal No: W-02(IM)(NCC)-24-01-2019 ("Appeal No. 24") and Civil Appeal No: W-02(IM)(NCC)-26-01-2019 ("Appeal No. 26").

Salient Facts

[4] The Summit Subang USJ ("The Summit") is an integrated property development consisting of the office block, the hotel block, the retail podium and the basement car park. The plaintiffs are among the many unit proprietors in the retail podium.

[5] The first defendant is the management corporation of The Summit, incorporated under the Strata Titles Act 1985 (Act 318).

[6] The second defendant is the trustee for the parcels owned by AmFIRST Real Estate Investment Trust ("AMFIRST"), a real estate investment trust established in Malaysia in 2006. AMFIRST wholly owned the hotel block and the basement car park share units, almost wholly owned the office block share units, and almost 70% of the retail podium share units.

[7] The dispute between the parties in the present case arose from a renovation exercise carried out at the retail podium.

[8] The resolution to carry out the renovation exercise at the retail podium was passed during the Management Corporation's ("MC") first Annual General Meeting ("AGM"). The renovation was subsequently carried out and duly completed on 18 July 2016.

[9] During the second AGM, a resolution was passed that:

(i) the tender price of the renovation exercise amounted to RM70,480,868;

(ii) the cost would be borne by the respective unit proprietors of the retail podium at the rate of RM178.16 per share unit; and

(iii) 10% per annum penalty for late payment.

[10] More than 90% of the proprietors have paid the renovation cost except for the plaintiffs.

[11] On 13 December 2017, the plaintiffs instituted a civil suit against the first and second defendants before the Shah Alam High Court *via* Civil Suit No: BA-22NCvC-718-12-2017 ("the Shah Alam Suit"). However, on 22 February 2018, the Shah Alam Suit was withdrawn by the plaintiffs with the liberty to file afresh. Six days later, on 28 February 2018, the plaintiffs filed Suit 82 before the Kuala Lumpur High Court. The contents, matters and issues pleaded in the plaintiffs' statement of claim in Suit 82 are substantially the same as those in the plaintiffs' statement of claim in the Shah Alam Suit.

[12] On 20 December 2017, the first defendant instituted claims before the Strata Management Tribunal ("SMT") against the plaintiffs (except for the fifth plaintiff, the first plaintiff in respect of Lot F1.43 and the second plaintiff in respect of Lot S2.73). The first defendant later instituted the claim against the second plaintiff on 22 February 2018. The first defendant claimed outstanding contributions under the Strata Management Act 2013 (Act 757) and the renovation charges for the renovation exercise.

[13] On 10 April 2018, the first defendant filed an application in encl. 10 to strike out the plaintiffs' writ and statement of claim (except for the fifth plaintiff). The first defendant's application was allowed by the learned High Court Judge ("HCJ"). The learned HCJ ordered that:

(i) the first defendant's application in encl. 10 against the plaintiffs (except the claim of the first plaintiff concerning Lot F1.43) was allowed with costs of RM4,000 subject to allocator;

(ii) the first plaintiffs claim in respect of Lot F1.43 against the first defendant was stayed until the disposal of the tribunal proceeding against the plaintiffs; and

(iii) the plaintiffs are at liberty to refile their claim in the event the tribunal proceedings against the plaintiffs are withdrawn.

[14] On 17 April 2018, the second defendant filed an application in encl. 15 to strike out the plaintiffs' writ and statement of claim. The learned HCJ ordered a stay of the plaintiffs' proceeding against the second defendant in Suit 82 pending the determination of the first defendant's claim against the plaintiffs before the SMT.

[15] We will deal with the two appeals separately throughout this judgment.

Appeal No. 26

[16] Appeal No. 26 is the second plaintiff's appeal against the decision of the learned HCJ in encl. 10.

[17] The first defendant's application to strike out the plaintiffs' (except the fifth plaintiff) writ and statement of claim was filed under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012 ("ROC 2012"), which states:

> Striking out pleadings and endorsements (O. 18, r. 19)
>
> 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;

A (c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

B (2) No evidence shall be admissible on an application under sub-para. (1)(a).

(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[18] It is trite law that the court may exercise its power under any of the C limbs under O. 18 r. 19(1) of the ROC 2012 only in plain and obvious cases, when it can be clearly seen that a claim or answer is on the face of it to be obviously unsustainable. In *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, the Supreme Court held:

D The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. **It is only in plain and obvious cases that recourse should be had to the summary process under this rule** (per Lindley MR in *Hubbuck v. Wiikinson* [1899] 1 QB 86, p. 91), **and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable**" (*Attorney-General of Duchy of Lancaster* E *v. L & N.W. Ry. Co.* [1892] 3 Ch. 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wentock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA.). The authorities further show that if there is a point of law which requires serious F discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *para materia* with our O. 33 r. 2 Rules of the High Court) (*Hubbuck v. Wilkinson*) (*supra*). The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (emphasis added)

G **[19]** We find if helpful to refer to the case of *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651 where Low Hop Bing JCA (as he then was) in speaking for this court said:

[39] *A reasonable cause of action means simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person:* H per Diplock LJ in *Letang v. Cooper* [1965] 1 QB 222 at 242. This definition was followed in *Lim Kean v. Choo Koon* [1969] 1 LNS 94; *Nasri v. Mesah* [1970] 1 LNS 85; *Saw Gaik Beow v. Cheong Yew Weng & Ors* [1989] 1 LNS 75; *Newacres Sdn. Bhd v. Sri Alam Sdn. Bhd.* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321; and *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69. I

...

[73] In the context of O. 18 r. 19(1)(b), *"scandalous" is taken to mean wholly unnecessary and irrelevant and not just unpleasant allegations:* see *eg*, *Boey Oi Leng v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405 HC.

[74] *"Frivolous" or "vexatious" means that the pleadings are obviously unsustainable.*

[75] In considering this ground, affidavit and undisputed facts may be referred to.

...

[81] *The court has an inherent jurisdiction to prevent an abuse of its process: Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd.* [1993] 3 CLJ 606 SC.

[82] Illustrations of an abuse of the process of the court include:

(a) An intention to emharass the defendants: Ansa Teknik (M) Sdn. Bhd v. Cygal Sdn Bhd [1989] 1 LNS 26; or

(b) Where the process of the court has not been used in a bona fide manner and has been abused: Hadi Hassan v. Suria Records Sdn Bhd & Ors [2004] 8 CLJ 225.

[83] *The categories of abuse of process of the court are never closed* and will certainly proliferate pursuant to the myriad of circumstances available from the factual matrix found in each particular case.

[84] In *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin* [1988] 1 SLR 374 at p. 384, the Singapore Court of Appeal explained the scope of "an abuse of the process of the court" under O. 18 r. 19(1)(d) which is in *pari materia* with ours. *The term has been given a wide interpretation by the courts and includes considerations of public policy and the interests of justice. It signifies that the process of the court must be used bona fide and properly and must not be abused.* On the facts before us, the defendants have established an abuse of the process of the court. (emphasis added)

[20] In the present case, we found that the learned HCJ had correctly identified that the pivotal issue to be determined is whether the plaintiffs' claim against the first defendant was frivolous, vexatious, or otherwise an abuse of the court's process due to s. 106 of Act 757.

[21] According to learned counsel for the plaintiffs, s. 106 of Act 757 is unconstitutional since it excludes the court's inherent jurisdiction to hear disputes between parties. Reference was made to the case of *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 (FC), *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545 (FC) and *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners)* [2019] 5 CLJ 569; [2019] 3 MLJ 561 (FC).

[22] Learned counsel for the plaintiffs further submitted that the SMT is merely an inferior tribunal and the High Court has overriding jurisdiction to try this case. Furthermore, learned counsel for the plaintiffs claimed that the SMT has no jurisdiction to hear the plaintiffs' claim since the plaintiffs are suing both the first and second defendants, and are claiming for declaratory and injunctive reliefs, which the SMT has no power to grant.

[23] In *Semenyih Jaya*, the constitutionality of s. 40D of the Land Acquisition Act 1960 (Act 486) was raised before the Federal Court. Under s. 40D of Act 486, the courts were obliged to adopt the opinion of the two assessors or elect to concur with either of them if their decision differed from each other in respect of the amount of reasonable compensation arising out of the acquisition. The provision was found by the Federal Court to be unconstitutional, as it amounted to a usurpation of the judicial power of the courts. The relevant passage of the Federal Court's decision can be seen below:

> [49] By s. 40D of the Act, 'the amount of compensation to be awarded shall be the amount decided upon by the two assessors'. It would appear that s. 40D of the Act has broadened the ordinary role of assessors from advisors to fact finders and adjudicators.
>
> Section 40D of the Act reads:
>
> > (1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.
> >
> > (2) Where the assessors have each arrived at a decision which differs from each other then the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor.
> >
> > (3) Any decision made under this section is final and there shall be not further appeal to a higher Court on the matter.
>
> [50] *Section 40D of the Act thus imposes on the judge a duty to adopt the opinion of the two assessors or elect to concur with the decision of either of them if their decision differ from each other in respect of the amount of reasonable compensation arising out of the acquisition. The legislative intent is clear and unambiguous.* As highlighted by the Court of Appeal in *Jitender Singh a/l Pagar Singh & Ors v. Pentadbir Tanah Wilayah Persekutuan and another appeal* [2012] 1 MLJ 58; [2012] 2 CLJ 165 a *High Court judge cannot come to a valuation different from that of the assessors,* or if different, from either one of them.
>
> [51] Wherefore now stands the judge? *It would appear that he sits by the sideline and dutifully anoints the assessors' decision.*

[52] Section 40D of the Act therefore *effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it.* This power to decide a matter which is brought before the court is known as judicial power and herein lies the rub. What is 'judicial power'? (emphasis added)

[24] In *Indira Gandhi*, the first constitutional issue raised before the Federal Court was whether the High Court has exclusive jurisdiction under ss. 23, 24 and 25 and the Schedule of the Courts of Judicature Act 1964 read together with O. 53 of the Rules of Court 2012 and its inherent jurisdiction to review the actions of the Registrar of *Muallaf*s or his delegate acting as public authorities in exercising statutory powers vested by the Administration of the Religion of Islam (Perak) Enactment. The question was answered in the affirmative. Zainun Ali FCJ (as she then was), speaking for the Federal Court, held:

[101] It is not disputed that the *Registrar of Muallafs was exercising a statutory function as a public authority* under the Perak Enactment in issuing the said certificates. As had been clearly manifested earlier, *the jurisdiction to review the actions of public authorities, and the interpretation of the relevant state or federal legislation as well as the Constitution, lie squarely within the jurisdiction of the civil courts.* This jurisdiction, which constitutes the judicial power essential in the basic structure of the Constitution, is not and *cannot be excluded from the civil courts* and conferred upon the Syariah Courts by virtue of art. 121(1A). (emphasis added)

[25] In *JRI Resources*, the primary issue is whether s. 57 of the Central Bank of Malaysia Act 2009 (Act 701) is unconstitutional since any ruling made by the Shariah Advisory Council ("SAC") pursuant to a reference made to it is binding on the courts. The majority judgment answered this issue in the negative. Mohd Zawawi Salleh FCJ (as he then was), in delivering the majority judgment of the Federal Court, held:

[107] The second feature of judicial power as explained by Her Ladyship Zainun Ali FCJ is vested only in persons appointed to hold judicial office. Therefore, a non-judicial personage has no right to exercise judicial power. As observed by Lord Diplock in *Hinds v. The Queen* [1977] AC 195:

> What, however is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution.

[108] We have no reservations in accepting the proposition of law expounded in the *Semenyih Jaya* case. In our considered opinion, the SAC does not have any characteristics of judicial power as laid down in the *Semenyih Jaya* case. *The ruling made by the SAC is solely confined to the Shariah*

issue. The presiding judge who made reference to the SAC will then exercise his judicial power and decide the case based on the evidence submitted before the court. Since there is no judicial power vested in the SAC, the SAC does not usurp the judicial power of the court. (emphasis added)

[26] Therefore, it is incumbent in the present case to look into s. 106 of Act 757 and to determine whether there is a usurpation of the court's judicial power.

[27] Section 106 of Act 757 reads:

Section 106. Exclusion of jurisdiction of court

(1) *Where a claim is filed with the Tribunal and the claim is within the Tribunal's jurisdiction, the issues in dispute in that claim,* whether as shown in the initial claim or as emerging in the course of the hearing, *shall not be the subject of proceedings between the same parties in any court unless:*

(a) the proceedings before the court were commenced before the claim was filed with the Tribunal, or

(b) the claim before the Tribunal is withdrawn, abandoned or struck out.

(2) Where para. (1)(a) applies, the issues in dispute in the claim to which those proceedings relate, whether as shown in the initial claim or emerging in the course of the hearing, shall not be the subject of proceedings between the same parties before the Tribunal unless the claim before the court is withdrawn, abandoned or struck out.

(3) For the purpose of this section, a claim shall be deemed to have been made with the Tribunal when s. 108 has been complied with.

(emphasis added)

[28] In the present case, guided by the principle of statutory interpretation and construction outlined by this court in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317 (CA), the learned HCJ had looked into the relevant Hansard (dated 19 December 2012 by the then Minister of Housing and Local Government) to determine the legislative intent behind the incorporation of the said provision. The learned HCJ concluded, in which we agree, that:

[36] Turning to the Hansard of 19/12/2012, the Minister of Housing and Local Government at the material time stated that the intention of establishing the Strata Management Tribunal, is amongst others:

> Antara elemen penambahbaikan yang paling penting ada pewujudan tribunal pengurusan strata yang akan mewujudkan dl bawah rang undang-undang ini. Dengan prinsip murah, mudah dan cepat, pewujudan tribunal akan memberikan akses yang mesra pengguna kepada semua pihak yang tidak berpuas hati untuk menyalurkan tuntutan berkaitan penyelenggaraan dan pengurusan kepada tribunal tersebut.

Therefore in interpreting s. 106 of the SMA, this court must do it in accordance with the intention of Legislature as clarified in the Hansard and not stifle the purpose for which the Strata Management Tribunal was established in the first place.

[37] Based on the wordings of s. 106 and (2) of the SMA, I agreed with the observations of D1 and D2 that:

(a) *a claim cannot be the subject of the proceedings in the Strata Management Tribunal if there is already a similar claim pending in Court* unless the claim in Court has been withdrawn, abandoned or struck out;

(b) *likewise, a claim cannot he the subject of the proceedings in Court if there is already a similar claim pending in Strata Management Tribunal* unless the claim in Strata Management Tribunal has been withdrawn, abandoned or struck out;

(c) both sections 106(1) and (2) SMA are *drafted in such manner as to avoid having 2 similar claims to be decided in 2 different forums ie,* the Court and the Strata Management Tribunal. This would result in duplicity of proceedings which would:

(i) *waste unnecessary costs* to resolve essentially similar dispute in two different forums; and

(ii) may result in two different forums arriving at *inconsistent decision.*

(d) s. 106 excludes the Court's jurisdiction to adjudicate on common issues in dispute in the Tribunal Proceedings;

(e) *In the event any party is not satisfied with the award of the Strata Management Tribunal,* the said party *may file an application under s. 121 of the SMA to the High Court* to, amongst others, *set aside the award of the said Tribunal.* (emphasis added)

[29] In short, s. 106 of Act 757 merely excludes the court's jurisdiction if there is an earlier and pending claim filed within the SMT's jurisdiction with the same claim filed in court. If the earlier proceeding before the SMT is withdrawn, abandoned or struck out, the court still has the jurisdiction to hear the claim. Likewise, if the claim before the court is withdrawn, abandoned or struck out, the SMT still has the jurisdiction to hear the claim. As correctly put by the learned HCJ, this is to avoid duplicity of proceedings and inconsistent decisions between the two forums.

[30] In our view, s. 105 of Act 757, which confers jurisdiction to the SMT to hear and determine any claims specified in Part 1 of the Fourth Schedule to Act 757, does not confer any exclusive jurisdiction to the SMT which would otherwise derogate or usurp the judicial power of the courts. It only provides an alternative avenue for the parties to bring their claims.

[31] Section 105 of Act 757 reads:

> Section 105. Jurisdiction of Tribunal
>
> (1) The Tribunal shall have the jurisdiction to hear and determine any claims specified in Part 1 of the Fourth Schedule and where the **total amount in respect of which an award of the Tribunal is sought does not exceed two hundred and fifty thousand ringgit** or such other amount as may be prescribed to substitute the total amount.
>
> (2) For the avoidance of doubt, the Limitation Act 1953 [Act 254] shall not apply to the proceedings of the Tribunal.
>
> (3) The **jurisdiction of the Tribunal shall not extend to any claim in which the title** to any land, or any estate or interest in land, or any franchise, **is in question.** (emphasis added)

[32] Certain limitations to the jurisdiction of the SMT were even put in place (see ss. 105(1), 105(3) and the Fourth Schedule of Act 757).

[33] Ultimately, it is either the court or the SMT that would hear the claim, but not both concurrently. The apparent advantage of pursuing a claim before the SMT is that it is cheaper and faster. Be that as it may, any aggrieved party may still challenge the SMT's award on the ground of serious irregularity under s. 121 of Act 757 or apply to review the decision of the SMT under O. 53 of ROC 2012, an order of *certiorari* to quash the SMT's findings.

[34] See *Outlet Rank (M) Sdn Bhd v. Malayan Banking Bhd & Anor* [2013] 1 LNS 554 (HC) on a similar issue under s. 16 of the Housing Development (Control and Licensing) Act 1966 (Act 118).

[35] In a nutshell, we are of the considered opinion that s. 106 of Act 757 is not *ultra vires* to the Federal Constitution and does not in any way amount to a usurpation to ouster the court's judicial power.

[36] On the merits of this appeal, we agree with learned counsel for the first defendant that the claim for the renovation charges, *inter alia*, falls under para. 3 Part 1 of the Fourth Schedule of Act 757, namely, a claim for the recovery of charges and non-payment of the same can be declared as a debt. As such, we find that Part 1 of the Fourth Schedule is engaged, and the claim for the renovation costs falls within the jurisdiction of the SMT.

[37] We agree with the findings of the learned HCJ that the same issue was raised in the first defendant's claim before the SMT and the plaintiffs' claim against the defendants in Suit 82 before the High Court.

[38] Since the first defendant's claim before the SMT was filed earlier than the filing of Suit 82, and the claim has not been withdrawn, abandoned or struck out, we share the same view with the learned HCJ that s. 106(1) of Act 757 applies to the facts in the present case.

[39] Section 106(1) of Act 757 made it clear that the issue in dispute shall not be the subject of proceedings between the same parties in any court unless the proceeding before the court was commenced before the claim was filed with the Tribunal or the claim before the Tribunal is withdrawn, abandoned or struck out. In the circumstances of this case and in view of the SMT proceedings, the plaintiffs' claim against the first defendant was frivolous, vexatious and it is otherwise an abuse of the court's process. As such, we find this is an obviously unsustainable case which should be struck out under O. 18 r. 19(1) of ROC 2012.

[40] In a nutshell, we found no merits in the plaintiffs' appeal. Therefore, the plaintiffs' appeal in Appeal No. 26 was dismissed with costs of RM10,000.

Appeal No. 24

[41] Appeal No. 24 is the second plaintiff's appeal against the decision of the learned HCJ in encl. 15. On this issue, the learned HCJ found that:

> [39] The Plaintiffs submitted that since D2 cannot be made a party to the Tribunal Proceedings, the dispute is best decided in Court and the dispute cannot be divided so that part is dealt with by the Strata Management Tribunal and another part by the Court. The Plaintiffs claim there is a lacuna under s. 106 of the SMA. The case of *Bina Jati Sdn Bhd v. Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 was cited. In *Bina Jati* (*supra*) the High Court allowed the respondent (Sum-Project)'s originating summons to seek a declaration that the subject matter in dispute was not arbitrable and that the arbitration proceedings be stayed. The Court of Appeal on appeal, amongst others, held:
>
> > 45.2 Where some are parties and others are not parties to the arbitration, it is best that their disputes be dealt with by the court.
> >
> > 45.3 Disputes between parties cannot be divided so that part is dealt with by arbitration and another part in court. The allegations of fraud and collusion between the appellant, the engineer and the architect cannot be dealt with in any proceedings (including arbitration) unless both the engineer and the architect are parties to those proceedings (pp. 81 and 83).
>
> [39.1] With respect, the Plaintiffs' submission is in my view flawed. *Bina Jati*'s case can be distinguished for the reasons submitted by D1:
>
> > (a) *Bina Jati*'s case concerns arbitration agreement and is totally different from the present case. In this regard, Arbitration Act 2005 does not have section 106 SMA equivalent which provides that a claim cannot be the subject of the proceedings in Court if there is already a similar claim pending in the SMT (Strata Management Tribunal); and
> >
> > (b) *Bina Jati*'s case concerns a construction dispute with allegation of liability against contractors, architect and engineer and their respective liability is different and separate from each other.

A [40] In so far as the claim of conspiracy to injure is concerned, I am in agreement with the submission of D1 and D2 that:

(a) the main issue is whether D21 breaches the SMA. This issue involves an examination of the legality of the Renovation Exercise and impugned Charges and is within the jurisdiction of the Strata Management Tribunal. If there is no breach of the SMA by D1, there can never be a claim for conspiracy; and

B

(b) if the Strata Management Tribunal finds that D1 breaches the SMA, then the Plaintiff may commence their claim against D2 for conspiracy.

C **[42]** We agree with the learned HCJ and found no reason to disturb her findings above.

[43] In short, we found no merits in the plaintiffs' appeal. Therefore, the plaintiffs' appeal in Appeal No. 24 was also dismissed with costs of RM10,000.

D

Conclusion

[44] In conclusion, we are of the considered view that there are no merits in Appeal Nos. 24 and 26. Therefore, these appeals are dismissed with costs of RM10,000 for each appeal subject to allocator.

E

F

G

H

I